

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand and six.

PRESENT:

HON. JOSEPH M. McLAUGHLIN,
HON. JOSÉ A. CABRANES,
HON. ROSEMARY S. POOLER,
Circuit Judges.

Yun Zhu Zhou, Kuai Yao Lin,
Petitioners,

v.

No. 04-4045-ag
NAC

United States Department of Justice,
Attorney General Alberto R. Gonzales,¹
Respondent.

FOR PETITIONER: Bruno Joseph Bembi, Hempstead, New York.

FOR RESPONDENT: R. Alexander Acosta, United States Attorney for the Southern District of Florida, Anne R. Schultz, Laura Thomas Rivero, Emily M. Smachetti, Assistant United States Attorneys, Miami, Florida.

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as the respondent in this case.

1 UPON DUE CONSIDERATION of this petition for review of a decision of the Board of
2 Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED that the
3 petition for review is GRANTED in part, DISMISSED in part, the BIA’s order is VACATED, and
4 the case is REMANDED to the BIA for further proceedings consistent with this decision. The
5 government’s motion for acceptance of its untimely brief is DENIED.

6 Yun Zhu Zhou, though counsel, petitions for review of the BIA order affirming the decision
7 of Immigration Judge (“IJ”) Robert Weisel, denying her application for asylum, withholding of
8 removal, and relief under the Convention Against Torture (“CAT”), in which her son, Kuai Yao Lin,
9 was named a derivative beneficiary. We assume the parties’ familiarity with the underlying facts and
10 procedural history of the case.

11 As an initial matter, we find that the government has failed to establish exceptional
12 circumstances justifying the untimely filing of its brief. The Assistant U.S. Attorney for the
13 Southern District of Florida states that she was unaware of the actual deadline of the brief because
14 she was given the wrong information by the office of the U.S. Attorney for the Southern District of
15 New York. Since the present attorney filed a notice of appearance prior to the deadline for filing, it
16 would have been reasonable to expect that she verify the status of her case. Moreover, the brief was
17 filed 61 days out of time. Because the government failed to demonstrate exceptional circumstances,
18 we deny the government’s motion and proceed in this case without considering the arguments made
19 in its brief.

20 When the BIA affirms the decision of the IJ without issuing an opinion, *see* 8 C.F.R. §
21 1003.1(e)(4), this Court reviews the IJ’s decision as the final agency determination. *See, e.g., Twum*
22 *v. INS*, 411 F.3d 54, 58 (2d Cir. 2005). This Court reviews the agency’s factual findings, including
23 adverse credibility determinations, under the substantial evidence standard, treating them as
24 “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8
25 U.S.C. § 1252(b)(4)(B); *see, e.g., Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 n.7 (2d Cir. 2004).
26 However, we will vacate and remand for new findings if the agency’s reasoning or its fact-finding
27 process was sufficiently flawed. *See Cao He Lin v. U.S. Dep’t of Justice*, 428 F.3d 395, 406 (2d Cir.
28 2005); *Tian-Yong Chen v. INS*, 359 F.3d 121, 129 (2d Cir. 2004); *see also Xiao Ji Chen v. U.S.*
29 *Dep’t of Justice*, 434 F.3d 144, 158 (2d Cir. 2006) (agreeing with this principle, but avoiding
30 remand, in spite of deficiencies in an adverse credibility determination, because it could be
31 confidently predicted that the IJ would adhere to the decision were the case remanded).

32 Zhou argues in her brief that the IJ erred in finding that the forced insertion of an IUD did not
33 constitute persecution. However, she did not raise any arguments regarding the past persecution
34 finding in her brief to the BIA. Accordingly, her past persecution claim is not exhausted, and this
35 Court lacks jurisdiction to review it. *See* 8 U.S.C. § 1252(d)(1); *Ivanishvili v. U.S. Dep’t of Justice*,
36 433 F.3d 332, 343 (2d Cir. 2006). We therefore dismiss the claim.

37 However, the IJ’s finding that Zhou lacked a well-founded fear of future prosecution, based
38 almost exclusively on activities that occurred (or did not occur) in China before Zhou left for the
39 United States, is not supported by substantial evidence. First, the IJ erred in failing to consider
40 whether the birth of Zhou’s second child in the United States affected her well-founded fear claim.
41 In his decision, the IJ found that Zhou does not have a well-founded fear of persecution in China
42 because she was not threatened with sterilization more than once in China, nor was she ever sought
43 for sterilization in China. The IJ erred in failing to consider Zhou’s claim that she would be
44 persecuted as the mother of *two* children, in conjunction with the evidence in the record regarding
45 the enforcement of the family planning policy for individuals with more than one child. The IJ’s

1 finding that the Chinese government's enforcement of the family planning policy was "lax" because
2 Zhou's husband testified he would be sterilized five years after the birth of their first child is
3 irrelevant. Even if the IJ was correct in determining that the policy is not enforced strictly after the
4 birth of a first child, the IJ's reasoning fails to consider whether the policy is just as lax when a
5 family has two children.

6 The IJ also erred by failing to consider all of the evidence in the record regarding the
7 enforcement of the policy in the particular situation of the applicant. Because the IJ failed to
8 consider whether Zhou's second child impacted her well-founded fear of persecution claim, it is
9 unclear from the IJ's decision whether he would have given the same weight to each witness's
10 testimony and supporting documents absent the error.

11 The IJ also erroneously discounted Zhou's well-founded fear claim because she failed to
12 prove that her husband would return to China if she is forcibly removed. The IJ reasoned that, since
13 Zhou's husband voluntarily lives in Boston without her, she was unable to prove that her family is
14 intact in the United States, or that her husband would accompany her to China. These findings,
15 however, are irrelevant to Zhou's claims, which are based on whether her two children would
16 accompany her to China. Zhou presented evidence that the Chinese government would be aware of
17 her two children, and the IJ erred in failing to consider this evidence in conjunction with the other
18 information in the record regarding the treatment of Chinese citizens with two children.

19 For the foregoing reasons, the IJ's finding that Zhou failed to prove she had a well-founded
20 fear of persecution is not supported by substantial evidence, and we remand the case to the BIA for
21 further consideration of Zhou's well-founded fear and withholding of removal claims.

22 We also find that the IJ erred in failing specifically to address Zhou's CAT claim because her
23 CAT claim was independent of the facts asserted in her asylum and withholding of removal claims.
24 *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 184-85 (2d Cir. 2004). Unlike her asylum
25 application, Zhou's CAT claim was predicated on her assertion that she would be detained and
26 tortured upon her return to China because she illegally departed from China. The IJ thus erred by
27 failing to address it. *See id.*

28 For the foregoing reasons, the petition for review is GRANTED in part, DISMISSED in part,
29 the BIA's order is VACATED, and the case is REMANDED to the BIA for further proceedings
30 consistent with this decision. The government's motion for acceptance of its untimely brief is
31 DENIED. Having completed our review, any stay of removal that the Court previously granted in
32 this petition is VACATED, and any pending motion for a stay of removal in this petition is DENIED
33 as moot. Any pending request for oral argument in this petition is DENIED in accordance with
34 Federal Rule of Appellate Procedure 34(a)(2) and Second Circuit Local Rule 34(d)(1).
35
36

37 FOR THE COURT:
38 Roseann B. MacKechnie, Clerk

39 By: _____
40